FILE COPY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947

No. 474

SAM ORMONT, individually, and doing business as ACME MEAT COMPANY,

*Petitioner,*

vs.

EARL W. CLARK, director, Division of Liquidation, Department of Commerce,

*Respondent.*

**Petition for a Writ of Certiorari to the United States Emergency Court of Appeals.**


WILLIAM KATZ,
415 Chester Williams Building, Los Angeles 13,

BENJAMIN F. KOSDON,
DALY B. ROBNETT,
1007 Spring Arcade Building, Los Angeles 13,

*Attorneys for Petitioner.*



The Myers Legal Press, Los Angeles. Phone VAndike 9007.

## SUBJECT INDEX


PAGE

Summary of matter involved ..... 1

Jurisdiction ..... 3

Questions presented ..... 5

Reasons for granting writ ..... 14

Supporting brief ..... 18

## TABLE OF AUTHORITIES CITED

### CASES


Cudahy Packing Co. v. United States, 15 F. (2d) 133 ..... 21

Davis v. Industrial Commission of Utah, 59 Utah 607, 206 Pac. 267 ..... 19

Fleming v. Farmers' Peanut Co., 57 Fed. Supp. 628 ..... 21

Forsythe v. Village of Cooksville, 356 Ill. 289, 190 N. E. 421 ..... 19

Mid-Continent Petroleum Corp. v. Alexander, 35 F. (2d) 43 ..... 20

Rosensweig v. United States, 144 F. (2d) 32 ..... 23

Suwanee Fruit and Steamship Company v. Philip B. Fleming, 160 F. (2d) 897 ..... 14, 15, 18, 21, 23

Tower and Sona v. United States, 9 Cust. App. 307 ..... 19


### STATUTES


Emergency Price Control Act, Sec. 3(e) (50 U. S. C. A., App. Sec. 903, pp. 352, 353) ..... 2, 3, 5, 7, 9, 10, 11, 12, 13, 16, 18, 22

Emergency Price Control Act, Sec. 204(d) ..... 3, 23

Emergency Price Control Act of 1942, Sec. 901(a), Subsec. (e)(4)(B), Chap. 671, Sec. 3, Stat. 664, 1946 Cumulative Annual Pocket Appendix to 50 U. S. C. A., App. ..... 13

Judicial Code, Sec. 240 (28 U. S. C. A., Sec. 347) ..... 3, 23

Packers' and Stockyards Act of 1921 (7 U. S. C. A. 181-229) 21

Revised Maximum Price Regulation No. 148 ..... 2

Revised Maximum Price Regulation No. 169 ..... 2, 4, 5, 6, 7, 9, 11, 15, 17, 18, 20

Revised Maximum Price Regulation No. 169, Sec. 1364.452(p) 11

Revised Maximum Price Regulation No. 169, Sec. 1364.477(5), Amendment No. 1 ..... 4, 5, 6, 7, 12, 16, 19, 22, 23

Revised Maximum Price Regulation No. 169, Amendments Nos. 1 to 55 ..... 2, 9, 20

Revised Maximum Price Regulation No. 169, Sec. 1364.477(3), Amendment No. 6 ..... 4, 5, 6, 7, 11, 12, 16, 18, 19, 22, 23

PAGE

Revised Maximum Price Regulation No. 169, Amendment No. 169 ..... 9, 17, 20
Revised Maximum Price Regulation No. 239 ..... 2
Revised Maximum Price Regulation No. 389 ..... 2
Revised Maximum Price Regulation No. 398 ..... 2
Rules of the United States Supreme Court, Rule 38(2) ..... 3, 24
United States Code Annotated, Title 50, p. 146 ..... 4
United States Code Annotated, Title 50, App., Sec. 903(e) ..... 2, 3

TEXTBOOKS

59 Corpus Juris, p. 855 ..... 20
3 Corpus Juris Secundum, p. 366 ..... 19
3 Corpus Juris Secundum, Sec. 65, p. 476 ..... 21
7 Federal Register 1038 ..... 4, 18
8 Federal Register 4844 ..... 11, 18

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947

No. .....

---

SAM ORMONT, individually, and doing business as ACME MEAT COMPANY,

*Petitioner,*

*vs.*

EARL W. CLARK, director, Division of Liquidation, Department of Commerce,

*Respondent.*

---

**Petition for a Writ of Certiorari to the United States Emergency Court of Appeals.**

---

Your petitioner, Sam Ormont, individually and doing business as Acme Meat Company, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Emergency Court of Appeals entered in the above-entitled cause on November 10, 1947, dismissing the complaint of the complainant (petitioner).

## Summary of Matter Involved.

The complaint filed before the United States Emergency Court of Appeals pursuant to order of the honorable District Court of the United States in and for the Southern District of California, Central Division, alleged that the complainant (petitioner), during the latter part of 1943 and continuously to and including June 30, 1946 was licensed and certified by the United States Department of Agriculture as a "non-processing slaughterer" engaged

exclusively in the slaughter of cattle and calves and the sale of beef and veal carcasses, and was a "non-processing" slaughterer (which was admitted in open court at the hearing before the United States Emergency Court of Appeals), and that such commodities were agricultural commodities; and that Revised Maximum Price Regulation No. 169, effective December 16, 1942, and all amendments thereto purporting to establish maximum prices for said commodities and to regulate the sale thereof were null and void *ab initio,* for the reason that such Regulation No. 169 and Amendments Nos. 1 to 55 thereto were void *ab initio* for the reason that they were not nor was either of them ever approved in writing or otherwise by the Secretary of Agriculture, as required by Section 903(e) (50 App. U. S. C. A.), also known as Section 3(e) of the Emergency Price Control Act; and that all purported amendments to said Regulation No. 169 were void *ab initio* for the reason that said Regulation No. 169 was itself null and void, and hence there was nothing to amend. And said complaint also claimed that Revised Maximum Price Regulations Nos. 148, 239, 389 and 398, and all amendments thereto, were void *ab initio* for the reason that they dealt with agricultural commodities and did not receive the written or other approval of the Secretary of Agriculture.

The respondent filed a motion to dismiss said complaint, and the United States Emergency Court of Appeals, by decision, order and opinion filed November 10, 1947, granted said motion to dismiss and entered a judgment dismissing the complaint of the complainant, on the ground that said commodities were not "agricultural commodities" and that no approval of the Secretary of Agriculture was required.

## Jurisdiction.

The jurisdiction of this court is invoked under Section 204(d) of the Emergency Price Control Act as Amended, and Section 240 of the Judicial Code as Amended (28 U. S. C. A., Sec. 347), and on the ground that the question involved, and decided by said judgment of said Emergency Court of Appeals, is an important question of Federal law which has not been, but which should be, settled by this court (Rule 38(2) Supreme Court), for the reason that it involves the liberty of the complainant (petitioner) and also involves the rights of numerous non-processing slaughterers throughout the United States, and that petitioner has no other plain, speedy or adequate remedy at law.

Said Section 3(e) of the Emergency Price Control Act, as originally adopted in 1942, read as follows:

> "Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person, with respect to any agricultural commodity, without the prior approval of the secretary of Agriculture." (Ch. 26, 56 Stat. 23; 50 U. S. C. A. Sec. 903(e).)

On June 30, 1945, the said section was amended so as to read as follows:

> "Notwithstanding any other provision of this or any other law, no action shall be taken under this act by the Administrator or any other person, without written approval of the Secretary of Agriculture, with respect to any agricultural commodity, or with respect to any regulation, order, price schedule or other requirement applicable to any processor, with respect to any food or feed product processed or

manufactured in whole or in substantial part from any agricultural commodity." (50 App. U. S. C. A., p. 146.)

Revised Maximum Price Regulation No. 169 was adopted and became effective December 16, 1942 (7 F. R. 1038), and on the same day Section 1364.477 thereof, and particularly Subparagraph 5 of said section was amended (Amendment No. 1) and became effective, in which it was provided:

> "That any beef carcass, or part or portion thereof, including any beef wholesale cut, which has been boned as permitted in Subpart B of this revised regulation, or otherwise, shall not be deemed a processed product."

And thereafter and effective April 14, 1943, said Section 1364.477 of said R. M. P. R. 169 was again amended by Amendment No. 6 so that Subparagraph 3 of said Section provided as follows:

> " 'Processed products' means cured, pickled, spiced, smoked, dried or otherwise processed beef and/or veal, including sausage containing any proportion of beef or veal: *Provided,* That any beef carcass, or cut thereof, including any beef wholesale cut which has been boned as permitted in Subpart B of this Revised Regulation or otherwise, or any veal carcass, or cut thereof, including any veal wholesale cut which has been boned as permitted in Subpart C of this Revised Regulation or otherwise, or any miscellaneous beef item defined in Section 1364.452(p) or product of the same type or similar thereto shall not be deemed a processed product . . ."

## Questions Presented.

1. The Office of Price Administration having adopted Amendment No. 1 to R. M. P. R. 169, effective December 16, 1942, expressly defining beef carcasses as *"non-processed products"* and having declared therein that such a carcass "shall not be deemed a *processed product,"* did not said Office of Price Administration thereby *conclusively* establish that such carcasses were "agricultural commodities" so far as said emergency price control act and all regulations of said Office of Price Administration were concerned?

2. The Office of Price Administration having adopted Amendment No. 6 to Section 1364.477(3) to R. M. P. R. 169, effective April 14, 1943, whereby it expressly provided that any *beef* or *veal* carcass "shall not be deemed a *processed product,"* did not said Office of Price Administration thereby *conclusively* establish that such carcasses were "agricultural commodities" so far as said emergency price control act and all regulations of said Office of Price Administration were concerned?

3. Said Office of Price Administration by said amendment No. 1 to Section 1364.477(5) of R. M. P. R. 169, effective December 16, 1942, having so declared and defined beef carcasses as not being "processed products" and hence being "agricultural commodities," was not said R. M. P. R. 169 and the first 55 amendments thereto (none of which were ever approved by the Secretary of Agriculture), *null and void* under Section 3(e) of the Emergency Price Control Act (50 App. U. S. C. A.), as to all such carcasses?

4. Said Office of Price Administration, by said amendment No. 6 to Section 1364.477(3) of R. M. P. R.

169, effective April 14, 1943, having so declared and defined *beef and veal* carcasses as not being "processed products" and hence being "agricultural commodities," was not said R. M. P. R. 169 and the first 55 amendments thereto (none of which were ever approved by the Secretary of Agriculture), *null and void* under Section 3(e) of the Emergency Price Control Act (50 App. U. S. C. A.), as to all such beef and veal carcasses?

5. The Office of Price Administration having adopted amendment No. 1 to R. M. P. R. 169, effective December 16, 1942, defining beef carcasses as "non-processed products" and therefore "agricultural commodities," could said Office of Price Administration make any valid amendments to said R. M. P. R. 169 so far as the same pertained to beef carcasses, without the approval of the Secretary of Agriculture as provided in Section 3(e) of the Emergency Price Control Act, *supra?*

6. The Office of Price Administration having, by amendment No. 6 to Section 1364.477(3) to R. M. P. R. 169, effective April 14, 1943, expressly declared beef and veal carcasses to be "non-processed products" and hence "agricultural commodities," could said Office of Price Administration thereafter make any valid amendment to said R. M. P. R. 169 so far as the same pertained to beef or veal carcasses, without obtaining the prior approval of the Secretary of Agriculture as required by Section 3(e) of the Amergency Price Control Act, *supra*?

7. Was the plaintiff (petitioner) bound by or amenable to R. M. P. R. 169 or the first 55 amendments thereto (none of which were ever approved by the Secretary of Agriculture as required by Section 3(e) of the Emergency Price Control Act) in slaughtering and selling beef

and veal carcasses, as alleged in his complaint before the United States Emergency Court of Appeals?

8. Was the plaintiff (petitioner) bound by or amenable to R. M. P. R. 169 or any of the amendments thereto (none of which were ever approved by the Secretary of Agriculture as required by Section 3(e) of the Emergency Price Control Act) in slaughtering and selling beef and veal carcasses, as alleged in his complaint before the United States Emergency Court of Appeals?

9. Did the United States Emergency Court of Appeals have any right, jurisdiction or authority to disregard said Section 1364.477(5) of R. M. P. R. 169, effective December 16, 1942, which declared that beef carcasses were not "processed products," and to substitute said court's own definition therefor and declare that such carcasses were "processed products," as it did in its decision?

10. Did the United States Emergency Court of Appeals have any right, jurisdiction or authority to disregard said Section 1364.477(3) of R. M. P. R. 169, effective April 14, 1943, declaring that *beef and veal* carcasses were not "processed products," and to substitute the said court's own definition of such carcasses, wherein it declared in its opinion that they were "processed products," contrary to said section?

11. Did the United States Emergency Court of Appeals have any right, jurisdiction or authority, under the respondent's motion to dismiss complainant's complaint, to disregard said Section 1364.477(5) of R. M. P. R. 169, effective December 16, 1942, and Section 1364.477(3) of R. M. P. R. 169, effective April 14, 1943, and which complaint alleged that the sole business of complainant

(petitioner) during all of said period was to slaughter beef cattle and calves and sell the beef and veal carcasses therefrom?

12. Do beef cattle and calves grown for human consumption, and which are universally conceded to be "agricultural commodities," cease to be such when slaughtered?

13. Do the carcasses of beef cattle and calves, which were grown for human consumption, cease to be "agricultural commodities" merely because the animals were slaughtered in order to render the same useful and available for human consumption?

14. Does the mere slaughtering of beef cattle and calves, which were grown for human consumption and which were "agricultural commodities," change their character from "agricultural commodities" to some other form of commodity?

15. If the farmer or grower of beef cattle and calves (which are universally conceded to be "agricultural commodities") slaughters them, do the carcasses thereby cease to be "agricultural commodities"?

16. In order for the carcasses of beef cattle and calves grown for human consumption to remain "agricultural commodities," must the slaughtering be done by the farmer or grower?

17. Does the mere fact that such beef cattle and calves are slaughtered by a "non-processing slaughterer" and not by the farmer or grower, render the carcasses thereof "non-agricultural commodities"?

18. Do "agricultural commodities" cease to be such merely because they are deprived of life by human agency and made ready for the use for which produced, namely,

human consumption, such as harvesting and threshing grain, pulling and threshing beans, digging and shelling peanuts, picking and hulling walnuts, shelling nuts, picking and crating apples and oranges, picking and shipping bananas and the like, and slaughtering domestic animals grown for human consumption?

19. Is the phrase "any agricultural commodity" used in Section 3(e) of the Emergency Price Control Act above quoted to be given the broad meaning which the phrase implies? Or is it to be given a narrow and constricted construction?

20. Was revised Maximum Price Regulation No. 169 valid without the prior approval of the Secretary of Agriculture, as the same applied to carcasses of beef cattle and veal?

21. Were any amendments Nos. 1 to 55 to said revised Maximum Price Regulation No. 169 (and which amendments were never approved by the Secretary of Agriculture), valid as to beef and veal carcasses?

22. Were any of the amendments beginning with Amendment No. 56 to revised Maximum Price Regulation No. 169 valid, although such latter amendments were approved by the Secretary of Agriculture, but said original Price Regulation No. 169 never so approved, so far as they applied to beef and veal carcasses?

23. Were any of the amendments beginning with Amendment No. 56 to revised Maximum Price Regulation No. 169 valid, none of which purported to or did readopt the provisions of revised Maximum Price Regulation No. 169?

24. Can there be a valid amendment of an indivisible portion of an invalid act or regulation?

25. Where a slaughterer operates exclusively under the authority and jurisdiction of the United States Department of Agriculture and has by the proper representatives of the United States Government been classified as a "non-processing slaughterer" and licensed as such by the department of Agriculture, and whose exclusive functions performed under such classification and regulations were to slaughter beef cattle and calves and sell the carcasses thereof, and who was not in any manner making or producing any "processed products" therefrom, did the Administrator of the Office of Price Administration have any right or authority to make or adopt any regulation fixing or attempting to fix maximum or other prices for which such "non-processing slaughterer" could sell such beef and veal carcasses, without first obtaining the consent and approval of the Secretary of Agriculture in the manner and form required by said Section 3(e) and amendments thereto?

26. Where a slaughterer operates exclusively under the authority and jurisdiction of the United States Department of Agriculture and has by the proper representatives of the United States Government been classified as a "non-processing slaughterer" and licensed as such by the Department of Agriculture, and whose exclusive functions performed under such classification and regulations were to slaughter beef cattle and calves and sell the carcasses thereof, and who was not in any manner making or producing any "processed products" therefrom, did the Administrator of the Office of Price Administra-

tion have any right or authority to make, adopt or enforce upon such "non-processing slaughterer" revised Maximum Price Regulation No. 169 or any amendments thereto, without the prior approval of the said Secretary of Agriculture in the manner and form required by said Section 3(e) and amendments thereto?

27. Is it not a fact that the respondent and his predecessors in office, including the Administrator of the Office of Price Administration and the Government of the United States, were and are estopped and debarred from, in any manner, form, court or forum, asserting that petitioner violated said revised Maximum Price Regulation No. 169 or any amendments thereto, for the reason that said administrator on April 14, 1943, adopted an amendment to Regulation No. 169, being Section 1364.477(3) (8 F. R. 4844), in which he expressly provided "that any beef carcass or cut thereof, including any beef wholesale cut, which has been boned as permitted in Subpart B of this revised regulation or otherwise, or any veal carcass or cut thereof, including any veal wholesale cut, which has been boned as permitted in Subpart C of this regulation or otherwise, or any miscellaneous beef item defined in Section 1364.452(p), or product of the same type or similar thereto, *shall not be deemed a processed product* . . ." (italics ours), and thereby led the petitioner to believe and understand that such products, not being "processed" products, were and continued to be "agricultural commodities," and that all price regulations pertaining thereto purported to be made or adopted by the said Administrator would not be valid unless the prior approval of the Secretary of Agriculture was obtained as required by said Section 3(e) and amendments thereto?

28. When Congress amended Section 3(e) of said Act so as to read as follows: "Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person without prior written approval of the Secretary of Agriculture, with respect to any agricultural commodity *or with respect to any regulation, order, price schedule or other requirement applicable to any processor with respect to any food or feed product processed or manufactured in whole or substantial part from any agricultural commodity,*" (italics ours) thereby virtually adding only the italicized portion above set forth, which thereafter required the Secretary of Agriculture's approval of any price regulation pertaining to *any food or feed product processed or manufactured in whole or in part from an agricultural commodity,* and which amendment was adopted more than two years after the Administrator had adopted Section 1364.477(5), effective as of December 16, 1942, and Section 1364.477(3), effective as of April 14, 1943, of R. M. P. R. 169 above set forth in question 27, expressly declaring that any beef or veal carcass *"shall not be deemed a processed product,"* did not Congress thereby conclusively establish its original intention when it adopted the original Section 3(e) that said section applied to beef and veal carcasses as so originally adopted, and that it was Congress' intention from the beginning that the Administrator should not nor should any other person take any action or make any regulation as to price or otherwise of beef or veal carcasses without the prior approval of the Secretary of Agriculture? And was not the United States Emergency Court of Appeals bound by such congressional intention and construction and precluded from differently classifying beef and veal carcasses

as *non*-agricultural products or as "products processed in whole or in part from agricultural products"?

29. For the same reasons above set forth in Question No. 28, is not the United States District Court in and for the Southern District of California, Central Division, in Case No. 19094, bound by said congressional intention and construction and precluded and debarred from further prosecuting said action against petitioner for alleged violations of said purported revised Maximum Price Regulation No. 169 and amendments thereto?

30. By the same token as shown in Questions 28 and 29 above, when Congress on July 25, 1946 (Chap. 671, Sec. 3, Stat. 664; 1946 Cumulative Annual Pocket Appendix to 50 App. U. S. C. A.) passed and added a new section numbered 901a to the Emergeny Price Control Act of 1942, and in Subsection (e) (4) (B) thereof defined "agricultural commodity" as follows: "B The term 'agricultural commodity' shall be deemed to mean any agricultural commodity and any food or feed product processed or manufactured in whole or substantial part from any agricultural commodity"; did not Congress thereby for the purpose of clarification conclusively show its original intent in adopting the Emergency Price Control Act of 1942, and particularly Section 3(e) thereof, that the phrase "any agricultural commodity" used in said Section 3(e) embraced beef and veal carcasses, and that they had been correctly defined by the Administrator of the Office of Price Administration by his regulation, Section 1364.477 set forth in Question 27 above? And are not both the United States Emergency Court of Appeals and the United States District Court in and for the Southern District of California, Central Division, bound by such definition and intent?

**Reasons for Granting Writ.**

1. The United States Emergency Court of Appeals ignored its prior decisions and interpretations of the Act in question, and various other well-reasoned authorities applicable to the decision of the questions involved herein, in the following particulars: The said United States Emergency Court of Appeals, in the case at bar, gave a very strained, constricted and narrow interpretation, rather than giving the broadest possible meaning, to the phrase "any agricultural commodity"; whereas, in the case of *Suwanee Fruit and Steamship Company v. Philip B. Fleming, etc.* (see Case Nos. 116 and 317), decided by the United States Emergency Court of Appeals on April 9, 1947, and reported (160 F. (2d) 897), the court decided and held as follows:

> "We are thus compelled to the conclusion that Congress did not use the phrase 'any agricultural commodity' as a phrase of art with a uniform meaning in all of the various subsections of Section 3, *but that on the contrary, it was used in each subsection in its ordinary meaning, limited only by the particular context. In Subsection (e) the context imposes no limitation upon the normal meaning of the phrase. On the contrary, as we shall later see, there was valid reason for thinking that Congress may well have intended the phrase as used in Subsection (e) to have its broadest possible meaning.* We, therefore, reject the Administrator's contention that the phrase 'any agricultural commodity' was used in Section 3 as a phrase of art and that it must for that reason be given the limited meaning in Subsection (e)." (Italics supplied.)

2. In the case at bar, the United States Emergency Court of Appeals based its decision upon the case of *Su-*

*perior Packing Company v. Earl W. Clark, Director, Division of Liquidation, Department of Commerce,* Case No. 276, decided November 10, 1947, and in which latter decision the said Honorable Court, in defining "agricultural commodity," on page 6 of its opinion conceded that "a live steer is an 'agricultural commodity' produced on a farm and *sold by a farmer* in its raw, natural or unprocessed state." Thus, although conceding that livestock are "agricultural commodities," nevertheless limiting the application of that phrase as used in the Emergency Price Control Act to agricultural commodities when "sold by a farmer" in a raw, natural and unprocessed state; whereas, in the case of *Suwanee Fruit and Steamship Company v. Philip B. Fleming, Temporary Controls Administrator, supra,* the complainant was engaged in the importation of bananas from the Dominican Republic and was neither the farmer nor the producer of such bananas, and the said United States Emergency Court of Appeals in that case held that such imported bananas in the hands of such importer constituted "agricultural commodities."

3. In the case at bar, based upon its decision in the said *Superior Packing Company* case, *supra,* the United States Emergency Court of Appeals said in effect that because the attack in both the case at bar and the *Superior Packing Company* case upon the validity of R. M. P. R. 169, had never been made in any prior case, although other attacks had been made, that although such fact did not disprove the soundness of the new argument, the Court should examine the same "with a robust skepticism," showing that the Court approached the point without giving it a fair consideration, but was skeptical about it. A decision should not be based upon such biased reasoning.

4. The United States Emergency Court of Appeals erred in holding beef carcasses to be a "distinct commodity, not produced on the farm and sold by farmers" and in holding that they are not agricultural commodities but are commodities "processed or manufactured in whole or substantial part from an agricultural commodity, the live steer." The United States Emergency Court of Appeals ignored the plain language of Section 3(e), and in construing the term "any agricultural commodity," when applied to beef cattle and calves, as applying only while such animals were alive, although they were produced exclusively for the meat.

5. The United States Emergency Court of Appeals completely ignored the definition and classification of beef and veal carcasses as "non-processed products" by the Office of Price Administration, Section 1364.477(5), effective December 16, 1942, and Section 1364.477(3), effective April 14, 1943, of R. M. P. R. 169, and substituted therefor its own holding that such carcasses were "processed products" because, as they said in effect, that would be the point of view of the steer.

6. Only because of the fact that said court completely ignored the plain provisions of said R. M. P. R. 169 above cited, defining beef and veal carcasses as "not processed products" and substituted therefor said court's own arbitrary holding that they were "processed products," was said Court able to hold that such products were not "agricultural commodities."

7. That petitioner has no direct appeal to any reviewing court from the said erroneous decision of said United States Emergency Court of Appeals, and his only remedy is by this Honorable Court granting said writ of review,

as there is no other plain, speedy or adequate remedy open to petitioner.

8. That unless this Honorable Court grants said writ of review, petitioner will be deprived of his day in court on the merits, because said United States Emergency Court of Appeals has dismissed his complaint on a motion to dismiss the same, without any opportunity for petitioner to have his day in court and present his case on the merits.

9. That unless this Honorable Court grants said writ, petitioner will be subjected to further prosecution by the District Court of the United States in and for the Southern District of California, Central Division, in said Case No. 19094, for alleged violations of said R. M. P. R. 169, consisting of alleged sales of beef carcasses, practically all of which alleged violations are alleged to have occurred long prior to August 3, 1945, the date on which the first of the amendments to said R. M. P. R. 169 was approved by the Secretary of Agriculture, namely, Amendment 56 (see Notice and Application to United States District Court for Leave to Sue, paragraph 3, attached to complaint herein and marked "Exhibit A"), and petitioner in said criminal action will be estopped and debarred by the said judgment and decision of said United States Emergency Court of Appeals fom raising the invalidity of said R. M. P. R. 169 and amendments thereto, and therefore petitioner's liberty is jeopardized by said decision and he may be illegally deprived thereof by reason of said erroneous decision.

10. That the said decision of said United States Emergency Court of Appeals is erroneous and contrary to the law and facts, as hereinbefore shown, and that said R. M. P. R. 169 and all amendments thereto are as to this petitioner null and void and were null and void *ab initio*.

**Supporting Brief.**

1. Any regulation of the Office of Price Administration affecting any agricultural commodity was void *ab initio* unless it had the prior approval of the Secretary of Agriculture, as required by Section 3(e) of the Emergency Price Control Act.

*Emergency Price Control Act,* Section 3(e) (50 App. U. S. C. A. 903, pp. 352, 353);

*Suwanee Fruit & Steamship Co. v. Philip B. Fleming, etc.,* decided by United States Emergency Courts of Appeals April 9, 1947; reported 160 F. (2d) 897.

2. R. M. P. R. 169 and amendments thereto pertain only to beef and veal, and Section 1364.477(3) was effective December 16, 1942 (7 F. R. 10381), the very day R. M. P. R. 169 was effective, and expressly declared that beef carcasses, boned beef, wholesale cuts, and the like,

"shall not be deemed processed products."

3. Effective April 14, 1943, Section 1364.477(3) of R. M. P. R. 169 was amended (8 F. R. 4844), and expressly declared that *beef and veal* carcasses, boned beef and veal, and wholesale cuts "shall not be deemed a processed product."

4. "Any agricultural commodity," as used in Section 3(e) (50 App. U. S. C. A. 903, pp. 352, 353), imposed no limitations upon the normal meaning of the phrase, but on the contrary was to have "its broadest possible meaning."

*Suwanee Fruit & Steamship Co. v. Philip B. Fleming, etc, supra.*

5. "Agriculture" includes process of supplying human wants by raising products of the soil and by "associated industries," such as the production of livestock for human consumption, including the manufacture of products of the farm into such forms as may be more convenient or more valuable for use or for sale.

3 C. J. S., page 366;

*Forsythe v. Village of Cooksville,* 356 Ill. 289, 190 N. E. 421, 422;

*Davis v. Industrial Commission of Utah,* 59 U. 607, 206 Pac. 267, 268;

*Tower and Sona v. United States,* 9 Cust. App. 307, 308.

6. The United States Emergency Court of Appeals, in Case No. 276, *Superior Packing Company v. Earl W. Clark, Director, etc.,* decided November 10, 1947, expressly held that a live steer was an "agricultural commodity." The same court, in the case of *Suwanee Fruit and Steamship Company v. Philip B. Fleming, etc., supra,* held that the term "agricultural commodity" was to be given "its broadest possible meaning." Therefore, since livestock are "agricultural commodities" produced for supplying human wants, particularly as a food, and are of no value as such until slaughtered, and since, under R. M. P. R. 169, Section 1364.477(5), effective December 16, 1942, and Section 1364.477(3), effective April 14, 1943, it was expressly provided that the carcasses and wholesale cuts from beef and veal livestock were not to be considered under the Emergency Price Control Act, and particularly under said R. M. P. R. 169, as "processed products," it must follow that they continued to be, as they were originally, "agricultural commodities," and that

therefore R. M. P. R. 169 was void *ab initio* in so far as it pertained to the slaughtering and sale of beef and veal carcasses, for the reason that it was never approved by the Secretary of Agriculture, which fact was admitted by the respondent by their motion to dismiss complainant's (petitioner's) complaint, the allegations of which complaint must be taken as true on a motion to dismiss.

7. For the same reason that R. M. P. R. 169 was void *ab initio* so far as it pertained to beef and veal carcasses and wholesale cuts, so likewise amendments Nos. 1 to 55, inclusive, were void *ab initio,* for the reason that none of them were ever approved by the Secretary of Agriculture.

8. R. M. P. R. 169 being void *ab initio* as to any regulations therein pertaining to maximum prices for the sale of beef or veal carcasses or wholesale cuts, for lack of approval by the Secretary of Agriculture, each and every purported amendment thereto, so far as the same pretended to fix maximum prices for the sale of beef or veal carcasses or wholesale cuts, was void *ab initio,* for the reason that even though amendments Nos. 56 *et seq.* were approved by the Secretary of Agriculture, none of them were complete in themselves, but were merely amendments of portions of said original R. M. P. R. 169, and since it was so void, no valid amendments thereto could be made or adopted.

59 C. J. 855;

*Mid-Continent Petroleum Corp. v. Alexander,* 35 F. (2d) 43.

9. "Agricultural commodities" do not cease to be such merely because they are deprived of their life or growing status and have passed into the hands of a party other than the farmer or grower.

*Suwanee Fruit and Steamship Co. v. Phillip B. Fleming, etc., supra.*

10. "Agricultural Commodities" do not cease to be such merely because they have gone through the process of preparation for human consumption, such as the digging and shelling of peanuts, the cutting and threshing of grain, the picking and shipping of bananas.

*Fleming v. Farmers' Peanut Co.*, 57 Fed. Supp. 628, 632, in which it was held that a peanut was an agricultural commodity and continued to be such *even after it had been shelled.*

11. Petitioner was a "non-processing slaughterer," slaughtering only beef cattle and calves and selling only the carcasses thereof, and was so admitted to be by the respondent at the hearing on their motion to dismiss the complaint, and was under the jurisdiction of the Secretary of Agriculture by virtue of the Packers' and Stockyards Act of 1921 (7 U. S. C. A. 181-229).

3 C. J. S. 476, Section 65;

*Cudahy Packing Co. v. United States,* 15 F. (2d) 133 (C. C. A., Ill.).

12. For the reason that complainant (petitioner) was so under the jurisdiction and regulation of the Secretary of Agriculture, the clear intent of Congress was that the Office of Price Administration, under the Emergency Price Control Act, should not make any regulation affect-

ing complainant's (petitioner's) business without the prior approval of the Secretary of Agriculture. This intent of Congress was shown by the adoption by it of Section 3(e) of the Emergency Price Control Act, *supra,* and was recognized by the Office of Price Administration by Section 1364.477(5), effective December 16, 1942, and Section 1364.477(3), effective April 14, 1943, of R. M. P. R. 169, in expressly declaring that beef and veal carcasses were not "processed products."

13. The decision of the United States Emergency Court of Appeals in the case at bar was based upon a false premise, in that said Court ignored all of the foregoing provisions of the law and regulations so classifying beef and veal carcasses as "non-processed products," and by failing to give any effect thereto and by basing its decision on its erroneous holding that such carcasses were "processed," as was said in its opinion in Case No. 276, *Superior Packing Co. v. Earl W. Clark, Director, etc.*:

> "A beef carcass, a wholesale cut, retail cuts, such as steaks or roasts, beef brains, kidneys, hearts, livers, or other edible by-products, as well as meat products resulting from still further processing, such as sausages—these are all distinct commodities not produced on the farm and sold by the farmer. They are not 'agricultural commodities,' but commodities processed or manufactured in whole or substantial part from an agricultural commodity, the live steer,"

which holding is in direct conflict with and in disregard of said Section 1364.477 (5), effective December 16, 1942, and Section 1364.477(3), effective April 14, 1943, of R. M. P. R. 169.

14. Unless this Honorable Court grants said petition and reviews the said decision of said United States Emergency Court of Appeals, petitioner will be deprived of a hearing on the merits and may be deprived of his liberty, notwithstanding the invalidity of said R. M. P. R. 169 and amendments thereto, under which he is being prosecuted in the District Court of the United States in and for the Southern District of California, Central Division, for the reason that said latter court has no jurisdiction to determine the invalidity of said regulations and amendments, but such jurisdiction is vested exclusively in the said United States Emergency Court of Appeals.

*Suwanee Fruit & Steamship Co. v. Philip B. Fleming, etc., supra*;

*Rosensweig v. United States,* 144 F. (2d) 32.

15. This Honorable Court has the jurisdiction to grant said petition and review said decision of said United States Emergency Court of Appeals, under the provisions of Section 204(d) of the Emergency Price Control Act as amended and Section 240 of the Judicial Code as amended (28 U. S. C. A. 347).

16. This Court should grant said petition for the reason that the questions involved in this case are important questions of federal law which have not been, but which

should be, settled by this Court, as provided under United States Supreme Court Rule 38(2), and for the further reason that unless the petition is granted this petitioner will be deprived of his rights and liberty under void rules and regulations of the Office of Price Administration.

For the reasons hereinbefore shown and in order to protect and safeguard the rights of the petitioner, the decision of the Court below should be brought here for review.

Wherefore, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Dated this 8th day of December, 1947.

WILLIAM KATZ,
BENJAMIN F. KOSDON,
DALY B. ROBNETT,
*Attorneys for Petitioner.*